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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 149.

JOHN A. McDONALD, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED OCTOBER 24, 1899.

(17,548.)

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1 In the Supreme Court of the United States, —— Term.

JOHN A. McDONALD, Plaintiff in Error,
v.
COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Error.

To the honorable Chief Justice of the United States Supreme Court:

The petition of John A. McDonald respectfully shows that at a sitting of the superior court for the Commonwealth of Massachusetts, held at Boston, August term, A. D. 1898, — rendered a judgment against your petitioner in a certain cause wherein The Commonwealth of Massachusetts was complainant and petitioner was defendant, as will appear by reference to the records and proceedings in said cause.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States—709, Revised Statutes.

Your petitioner claims that errors of law appear in the record of the above-entitled cause of action, and an assignment of errors is hereto annexed.

Your petitioner further claims that his constitutional rights as a citizen of the United States were infringed upon in the trial in said court, as will appear by the record and assignment of errors hereto annexed.

Your petitioner further claims that the law under which he was sentenced—Massachusetts Public Statutes of 1887, chapter 435—is unconstitutional and contrary to the United States Constitution and amendments thereof.

2 Wherefore your petitioner prays the allowance of a writ of errors, returnable to the Supreme Court of the United States, and for citation.

JOHN A. McDONALD, *Petitioner.*
FRANCIS P. MURPHY,
Attorney for Petitioner.

Copy of record and assignment of errors annexed.

3 *Assignment of Errors.*

First. The court erred in such judgment against the petitioner because the indictment charges the defendant with the commission of a crime punishable by the laws of another State and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its amendments—that is, article 14 of its amendments. The court invaded the prisoner's constitutional rights when it assumed an extra-

territorial jurisdiction and sentenced him to twenty-five (25) years as an habitual criminal for a crime committed in New Hampshire.

That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 3, section 2, United States Constitution, — holds that — all crimes except in cases of impeachment shall be held in the States where crimes are committed; and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional.

Second. That any statute allowing the Government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its amendments, which guarantee a fair and impartial trial to persons charged with crimes.

Third. The crime of being an habitual criminal was unknown to the common law and also to the statute law prior to 1887. It is a creation of statute, and when the statute was passed allow-
4 ing joinder of offences not permissible at common law there was no such crime known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual-criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular.

Fourth. It appears by the absence from the record of any appearance of counsel, and as a matter of fact is, that the prisoner at his trial was not represented by counsel, nor were his constitutional rights explained to him by the court, and in consequence thereof said trial was unconstitutional. Article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial; that he received no assistance from the Government in procuring counsel, and by reason of his poverty he was unable to retain counsel; that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, article 6, guaranteeing the accused counsel in all criminal prosecutions.

Fifth. That the law and *sentence* under which the defendant was sentenced is unconstitutional, inasmuch as its enactment is contrary to a provision of article 8 of amendments, United States Constitution, in that the punishment inflicted was a cruel and unusual punishment.

Sixth. That the said sentence is unconstitutional, inasmuch as its enactment is contrary to the provision of article 4, section 2, United States Constitution, and the eighth and fourteenth amendments thereof.

5 Seventh. That the law under which the prisoner was sentenced—Public Statutes 1887, chapter 435—is unconstitutional, inasmuch as its enactment is contrary to the provision of article 1, section 9, of the United States Constitution, which declares that no *ex post facto* laws shall be enacted.

Eighth. That the law under which the prisoner was sentenced—Public Statutes 1887, chapter 435—is unconstitutional, inasmuch as its enactment is contrary to the provision of article 5 of the United States Constitution, which declares that no man shall be put in jeopardy twice for the same offence, which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that after the judge's charge upon the whole indictment, the jury returned a verdict of guilty upon the four counts, as appears by the record, but said nothing in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count; that this whole procedure was irregular, prejudicial, and unconstitutional, and that the prisoner was unable by lack of counsel to take exceptions to these facts.

Ninth. The prisoner waives no rights which may not be stated in detail here and which may be apparent on the record, under the Constitution of the United States and amendments thereof.

JOHN A. McDONALD,
By his attorney, FRANCIS P. MURPHY,
748 *Tremont Building, Boston.*

6 *Affidavit of John A. McDonald, Petitioner, Taken at Massachusetts State Prison, Charlestown, Boston, Mass., August* 30, 1898.

I hereby solemnly swear that at my trial in superior court, August sitting, 1898, I was unrepresented by counsel, and that on account of my poverty I was unable to obtain counsel; that the judge failed to instruct the jury on the habitual criminal count, and that they brought in a verdict of guilty upon the two counts, as appears by the record; that they were again instructed (after a verdict of guilty had been rendered) on the habitual-criminal count, and, retiring again, brought in another verdict of guilty under the habitual-criminal count, and that I was unable by lack of counsel or legal knowledge to take exceptions to those facts at the proper time.

JOHN A. McDONALD.

7 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

[Seal of the Circuit Court, Massachusetts.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the

State of Massachusetts in which a decision could be had in the suit between Commonwealth of Massachusetts, plaintiff, and John A. McDonald, defendant, in a plea of not guilty, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John A. McDonald, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of November next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twelfth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice Superior Court.

8 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

And now, here, the judges of the superior court of said Commonwealth make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John I. Manning, clerk of said superior court (for the transaction of criminal business) within and for said county of Suffolk, have hereto set my hand and the seal of said court this twelfth day of October, A. D. 1899.

Seal of the Superior Court.

JOHN I. MANNING, *Clerk.*

9 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, on the* first Monday of November next, pursuant to a writ of error filed in the clerk's office of the† superior court of said Commonwealth, holden for the transaction of criminal business within and for the county of Suffolk, wherein John A. McDonald is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal of the Superior Court.

Witness the Honorable Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts, this 12th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

ALBERT MASON,
Chief Justice Superior Court.

9½ BOSTON, *October 12th*, 1899.

I accept due service of this citation.

HOSEA M. KNOWLTON,
Attorney General of Massachusetts,
By FRANKLIN T. HAMMOND,
Assistant Attorney General.

10 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

To all persons to whom these presents shall concern, Greeting:

Know ye that among the records of our superior court for the transaction of criminal business within and for the county of Suffolk, begun and holden at Boston, on the first Monday of August, A. D. 1898, *it* is there contained the following, the entire record in the case of The Commonwealth *versus* John A. McDonald, the following being the indictment found against said McDonald by the grand jurors on the sixth day of August, A. D. 1898:

11 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *To wit:*

At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of August, in the year of our Lord one

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

thousand eight hundred and ninety-eight, the Honorable Robert R. Bishop, a justice of said court, presiding;

12 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk,

At the superior court, begun and holden at Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of August, in the year of our Lord one thousand eight hundred and ninety-eight.

The jurors for the Commonwealth of Massachusetts on their oath present that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did falsely make, alter, forge, and counterfeit a certain check and order for money; which said check and order was of the tenor following—that is to say:

"$25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five *dollars* $\frac{00}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

13 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money; which said check and order was of the tenor following—that is to say:

"$25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five *dollars* $\frac{}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

14 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did

falsely make, alter, forge, and counterfeit a certain check and order for money; which said check and order was of the tenor following—that is to say:

[United States postage, I. R., 2 two cents 2.]

"BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

Pay to the order of John McDonald $25.00, twenty-five *dollars* — dollars.

No. 8. GEORGE W. COLBY."

with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

15 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present that John A. McDonald, otherwise call John McDonald, of Boston aforesaid, on the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money; which said check and order was of the tenor following—that is to say:

[United States postage, I. R., 2 two cents 2.]

"BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

Pay to the order of John McDonald $25.00, twenty-five *dollars* — dollars.

No. 8. GEORGE W. COLBY."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

16 And the jurors, aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that said John A. McDonald, otherwise called John McDonald, has been, before the commission of the felonies hereinbefore charged, twice convicted of crime, sentenced, and committed to prison, once in this Commonwealth and once in the State of New Hampshire, for terms of imprisonment of not less than three years each—that is to say, said McDonald was once convicted at a term of the superior court of this Commonwealth duly begun and holden at Boston, aforesaid, for the transaction of criminal business on the first Monday of April, in the year of our Lord eighteen hundred and ninety, of the crime of perjury upon an indictment therefor, and on the sixteenth day of said April said McDonald was duly sentenced upon said conviction by said court to imprisonment in the State prison in this Com-

monwealth for the term of three years, and in pursuance of said sentence said McDonald was, on the seventeenth day of said April, duly committed to said State prison; and again, said McDonald was convicted at a term of the supreme court holden at Manchester, within and for the county of Hillsborough, in the State of New Hampshire, on the first Tuesday of January, in the year of our Lord eighteen hundred and ninety-four, of the crime of obtaining property by means of false pretenses with intent to defraud, upon an indictment therefor; and thereupon said McDonald was duly sentenced upon said last-named conviction, by said court last named, to imprisonment in the State prison in said State of New Hampshire for the term of four years, and in pursuance of said sentence last mentioned said McDonald was, on the twelfth day of February, in the year last mentioned, duly committed to the State prison last above mentioned.

A true bill.

JAMES B. GORDON,
Foreman of the Grand Jury.

M. J. SUGHRUE,
1*st Ass't District Attorney.*

17 To said indictment said McDonald, after being set at the bar in said superior court on said sixth day of August and having said indictment read to him, *he* said thereof that he was not guilty.

On the ninth day of said August said McDonald was set at the bar and for trial put himself upon the country, and the Commonwealth did the like, by its attorney, Michael J. Sughrue, Esquire.

A jury was empanelled and sworn to try the issue, to wit, Daniel J. Murphy, foreman, and eleven of his fellows, namely, Peter Dwyer, the younger of that name; John D. Cushing, George H. Chase, Charles H. Foss, John H. Lally, Louis Shultz, Edward B. Burlingame, Jesse M. Stone, James A. Miller, Randolph V. King, and Joshua Lovett, who, after hearing and understanding all matters and things concerning the same, returned their verdict, and on oath said that said McDonald was guilty of the whole of said indictment.

Thereupon the said McDonald was deemed to be an habitual criminal.

It was therefore considered by the court that said McDonald for his offences as set forth in said indictment be punished by confinement in the State prison in Boston, in our county of Suffolk, for the term of twenty-five years, the first day of which is to be in solitary imprisonment and the residue thereof at hard labor, and that he stand committed until he be removed in pursuance of said sentence.

On the ninth day of August, A. D. 1898, said McDonald was committed to said State prison, as appears by the following warrant, with the officers' return of commitment thereon:

18 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *To wit:*

To the sheriff of said county of Suffolk, his deputies, the officers of the court hereinafter named, and the warden of the State prison in Boston, in said county of Suffolk, Greeting: [L. S.]

Whereas, by the consideration of the superior court for the transaction of criminal business, holden at Boston within and for the county of Suffolk, on the ninth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, John A. McDonald, otherwise called John McDonald, now in custody of the sheriff of said county of Suffolk, convict of the crimes of forgery of checks and orders for money, and uttering the same with intent to defraud, committed at said Boston, and said McDonald is deemed to be an habitual criminal, and was sentenced to be confined in said State prison for a term of twenty-five years, the first — day- of said term to be in solitary imprisonment and the residue thereof to be at hard labor and to stand committed in pursuance of said sentence.

We, therefore, command you, the said sheriff, deputies, and officers of said court, to remove the said McDonald from the jail in Boston, in the said county of Suffolk, to said State prison in Boston, in the said county of Suffolk; and we command you, the warden of said State prison, to receive the said McDonald, and immediately thereon to cause the said McDonald to be confined therein, for a term of twenty-five years, the first — day- of said term to be in solitary imprisonment and the residue thereof to be at hard labor; And for so doing this shall be your warrant; and you said sheriffs and officers are to make return of this warrant with your doings thereon, to the office of the clerk of said superior court in Boston, as soon as may be.

Witness Albert Mason, Esquire, chief justice of said superior court, at Boston, this ninth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, and sealed with the seal of said court.

[Seal of the Superior Court.]

JOHN P. MANNING,
Clerk of said Superior Court.

9 SUFFOLK, *To wit:*

CITY OF BOSTON, *August 9th*, 1898.

In obedience to the within warrant, I have conveyed the within-named John A. McDonald, alias —— ——, to the State prison in Boston, in the county of Suffolk, and delivered him to the warden thereof, with a copy of this warrant.

Fees.

Service..... $
Copy.....
Travel.....

Expenses.

Conveyance in Boston.....

$

WM. G. TYLER,
Deputy Sheriff of said County of Suffolk.

[Endorsed:] No. 1736. State prison. Warrant *vs.* John A. McDonald, alias —— ——. Hard labor, 25 years. Solitary —, first — day-. Deemed an habitual criminal Aug. 9, 1898.

20 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our superior court to be hereunto affixed.

Seal of the Superior Court.

Witness Albert Mason, Esquire, chief justice of our said superior court, at Boston, this twelfth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN P. MANNING, *Clerk.*

21 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court for the Transaction of Criminal Business.

BOSTON, *October* 12, 1899.

I, John P. Manning, clerk of said superior court, do hereby certify that the foregoing are true copies of the records of said superior court in case of Commonwealth *vs.* John A. McDonald.

I. The indictment.

II. Record and judgment of said court in said case.

III. Warrant of commitment to prison.

IV. And all the proceedings in said case, with all things concerning the same.

Seal of the Superior Court.

In testimony whereof I hereunto set my hand and affix the seal of said superior court, at Boston aforesaid, this twelfth day of October, A. D. 1899.

JOHN P. MANNING, *Clerk.*

22 On the thirtieth day of August, A. D. 1898, said McDonald, by his attorney, filed a petition for a writ of error in the supreme judicial court of said Commonwealth of Massachusetts; which petition, with the assignments of error, writ of error, writ of *scire facias ad aud. err.*, plea of the Commonwealth, facts agreed upon by parties, rescript, motion for judgment, judgment, are as follows:

23 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

JOHN A. MCDONALD, Plaintiff in Error,
v.
THE COMMONWEALTH.

Petition for Writ of Error.

Respectfully represents your petitioner, John A. McDonald, that at a sitting of the superior court held at Boston for the transaction of criminal business, August term, in the year of our Lord 1898, he was indicted for the crimes of forgery and also with being an habitual criminal; that in the trial of the above charges he was convicted of the whole indictment, and then and there sentenced to the Massachusetts State prison, Charlestown, Mass., for a term of twenty-five years, one day solitary confinement. Your petitioner complains that errors of law appear in the record in the above-entitled cause of action, and respectfully petitions to the supreme judicial court that you will issue a citation to the Commonwealth of Massachusetts on said writ of error, returnable the first Monday of October, A. D. 1898, and herewith files his assignment of errors as follows:

First. The court erred in such judgment against the petitioner, because the indictment charges the defendant with the commission of a crime punishable by the laws of another State, and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its amendments, that is, article 14 of its amendments. The court invaded the prisoner's constitutional rights when it assumed an extra-territorial jurisdiction and sentenced him to twenty-five (25) years as an habitual criminal for a crime committed in New Hampshire.

That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 3, section 2, United States Constitution—holds that —all crimes except in cases of impeachment shall be held in the States where crimes are committed, and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional.

24 Second. That any statute allowing the Government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its amendments, and the constitution and bill of rights of the State of Massachusetts, which guarantee a fair and impartial trial to persons charged with crimes.

Third. The crime of being an habitual criminal was unknown to the common law, and also to the statute law prior to 1887; it is a creation of statute, and when the statute was passed allowing joinder of offenses not permissible at common law there was no such crime

known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular.

Fourth. It appears, and as a matter of fact is, that the prisoner at his trial was not represented by counsel, nor were his constitutional rights explained to him by the court, and in consequence thereof said trial was unconstitutional, and contrary to article 12, constitution of Massachusetts, and article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial, that he received no assistance from the Government in procuring counsel, and by reason of his poverty he was unable to retain counsel; that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, article 6, guaranteeing the accused counsel in all criminal prosecutions; and that it is also contrary to article 12, constitution of Massachusetts.

Fifth. That the law and sentence under which the defendant was sentenced is unconstitutional, inasmuch as its enactment is contrary to a provision of article 5 of amendments, United States Constitution, in that the punishment inflicted was a cruel and unusual punishment, and said law and sentence is contrary to article 26, constitution of Massachusetts.

Sixth. That the said sentence is unconstitutional, inasmuch as its enactment is contrary to the provision of article 4, section 2, United States Constitution, which gives to every citizen the equal protection of the laws, and therefore the State, by assuming jurisdiction of a foreign crime, did not give the defendant equal protection of the laws.

Seventh. That the law under which the prisoner was sentenced, Pub. Sts. 1887, c. 435, is unconstitutional, inasmuch as its enactment is contrary to the provision of article 1, section 9, of the United States Constitution, and article 24, Massachusetts constitution and bill of rights, which declare that no *ex post facto* laws shall be enacted.

Eighth. That the law under which the prisoner was sentenced, Pub. Sts. 1887, c. 435, is unconstitutional, inasmuch as its enactment is contrary to the provision of article 5 of the United States Constitution, and amendments thereto, and article 12, constitution of Massachusetts, which (U. S. C.) declares that no man shall be put in jeopardy twice for the same offence, which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that, after the judge's charge upon the whole indictment, the jury returned a verdict of guilty upon the two counts, as appears by the record, but said nothing in his charge on the habitual-criminal count. That when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the

habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count. That this whole procedure was irregular, prejudicial, and unconstitutional, and that the prisoner was unable by lack of counsel to take exceptions to these facts.

There was no stenographic report taken of the trial.

Ninth. The prisoner waives no rights which may not be stated in detail here, and which may be apparent on the record, either under the Constitution of the United States and amendments thereof, or under the Massachusetts constitution and bill of rights.

The petitioner is aware of the decisions concerning this law, but desires to have his rights preserved as a citizen of the United States, so that in case of an adverse decision by this honorable court he may have the right of removal of his cause to the United States Supreme Court.

JOHN A. McDONALD,
By his attorney, FRANCIS P. MURPHY,
748 *Tremont Building, Boston.*

Attested copy of record annexed.

Affidavit of John A. McDonald, Petitioner, Taken at Massachusetts State Prison, Charlestown, Boston, Mass., August 30, 1898.

I hereby solemnly swear that at my trial in superior court, August sitting, 1898, I was unrepresented by counsel, and that on account of my poverty I was unable to obtain counsel. That the judge failed to instruct the jury on the habitual-criminal count, and that they brought in a verdict of guilty upon the two counts, as appears by the record. That they were again instructed (after a verdict of guilty had been rendered) on the habitual-criminal count, and, retiring again, brought in another verdict of guilty under the habitual-criminal count. And that I was unable by lack of counsel or legal knowledge to take exceptions to those facts at the proper time.

JOHN A. McDONALD.

26 SUFFOLK, *ss:*

Subscribed to and sworn to, this 30th day of August, 1898, before me—

FRANCIS P. MURPHY,
[NOTARIAL SEAL.] *Notary Public.*

Filed August 30, 1898.

Writs of error and *scire facias* issued same day, returnable first Monday of October.

Return of Chief Justice of Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Pursuant to the precept of this writ to me directed, I herewith send the record and process within mentioned, with all things touching the same, all which are hereto annexed, to the honorable the justices of the supreme judicial court within named.

In testimony whereof, I hereunto put my hand and seal this 6th day of September, A. D. 1898.

ALBERT MASON,
Chief Justice of the Superior Court.

Record from Superior Court.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *To wit:*

At the superior court begun and holden at the city of Boston within and for the county of Suffolk for the transaction of criminal business, on the first Monday of August in the year of our Lord one thousand eight hundred and ninety-eight, the Honorable Robert R. Bishop, a justice of said court, presiding:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

At the superior court begun and holden at Boston within and for the county of Suffolk for the transaction of criminal business, on the first Monday of August in the year of our Lord one thousand eight hundred and ninety-eight:

The jurors for the Commonwealth of Massachusetts on their oath present, that John A. McDonald, otherwise called John Mc-
27 Donald, of Boston aforesaid, on the eighth day of July in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did falsely make, alter, forge, and counterfeit a certain check and order for money, which said check and order was of the tenor following; that is to say—

"$25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five $\frac{00}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid, do further present, that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the eighth

day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money, which said check and order was of the tenor following; that is to say—

"25.00. BOSTON, *July* 8, 1898.

The Winthrop national bank, Ames building, Court St.,

Pay to the order of John McDonald twenty-five $\frac{00}{100}$ dollars.
No. 5. GEORGE W. BIGLOW."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit, as aforesaid, with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did falsely make, alter, forge, and counterfeit a certain check and order for money, which said check and order was of the tenor following; that is to say—

28 "BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

[U. S. int. rev. stamp, 2 cts.]

Pay to the order of John McDonald $25.00 twenty-five dollars.
No. 8. GEORGE W. COLBY"

with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that John A. McDonald, otherwise called John McDonald, of Boston aforesaid, on the ninth day of July in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did utter and publish as true a certain false, forged, altered, and counterfeit check and order for money, which said check and order was of the tenor following; that is to say,—

"BOSTON, *July* 9, 1898.

Union Loan & Trust Company, 95 Milk street,

[U. S. int. rev. stamp, 2 cts.]

Pay to the order of John McDonald $25.00 twenty-five dollars.
No. 8. GEORGE W. COLBY."

he, the said McDonald, then and there well knowing the said check and order to be false, forged, altered, and counterfeit as aforesaid,

with intent thereby then and there to injure and defraud: against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid, do further present, that said John A. Mc Donald, otherwise called John McDonald, has been, before the commission of the felonies hereinbefore charged, twice convicted of crime sentenced and committed to prison, once in this Commonwealth and once in the State of New Hampshire, for terms of imprisonment of not less than three years each; that is to say, said McDonald was once convicted at a term of the superior court of this Commonwealth duly begun and holden at Boston aforesaid for the transaction of criminal business, on the first Monday of April in the year of our Lord eighteen hundred and ninety, of the crime of perjury, upon an indictment therefor; and on the sixteenth day of said April said McDonald was duly sentenced upon said conviction by said court to imprisonment in the State prison in this Commonwealth for the term of three years; and in pursuance of said sentence said Mc Donald was, on the seventeenth day of said April, duly com-
29 mitted to said State prison; and again, said McDonald was convicted at a term of the supreme court holden at Manchester within and for the county of Hillsborough in the State of New Hampshire, on the first Tuesday of January in the year of our Lord eighteen hundred and ninety-four, of the crime of obtaining property by means of false pretences with intent to defraud, upon an indictment therefor; and thereupon said McDonald was duly sentenced upon said last-named conviction by said court last named to imprisonment in the State prison in said State of New Hampshire for the term of four years; and in pursuance of said sentence last mentioned said McDonald was, on the twelfth day of February in the year last mentioned, duly committed to the State prison last above mentioned.

A true bill.

JAMES B. GORDON,
Foreman of the Grand Jury.

M. J. SUGHRUE,
1st Ass't District Attorney.

Record.

This indictment is found and returned into said superior court by the grand jurors on the sixth day of August, A. D. 1898, and on said day the said McDonald is set at the bar; and having said indictment read to him, he says thereof that he is not guilty.

On the ninth day of said August, the said McDonald is set at the bar, and for trial puts himself upon the country, and the Commonwealth does the like by its attorney, Michael J. Sughrue, Esquire.

A jury is empanelled and sworn to try the issue, to wit, Daniel J. Murphy, foreman, and eleven of his fellows, namely, Peter Dwyer the younger of that name, John D. Cushing, George H. Chase, Charles H. Foss, John H. Lally, Louis Shultz, Edward B. Burlin

game, Jesse M. Stone, James A. Miller, Randolph V. King, and Joshua Lovett, who, after hearing and understanding all matters and things concerning the same, return their verdict, and on oath say that the said McDonald is guilty of the whole of said indictment.

Thereupon the said McDonald is deemed to be an habitual criminal.

It is therefore considered by the court that the said McDonald, for his offences as set forth in said indictment, be punished by confinement in the State prison in Boston in our county of Suffolk for the term of twenty-five years, the first day of which is to be in solitary imprisonment, and the residue thereof at hard labor, and that he stand committed until he be removed in pursuance of said sentence.

All of which appears of record in said superior court at the August sitting A. D. 1898.

In testimony whereof, I hereunto set my hand and affix the seal of said superior court at Boston aforesaid, this twenty-fourth day of August in the year of our Lord one thousand eight hundred and ninety-eight.

JULIAN SERIACK,
Assistant Clerk.

[SEAL.]

30 *Plea of the Commonwealth.*

And now comes the attorney general in behalf of the Commonwealth, and says that, by reason of any matters of fact for error assigned in the fourth assignment of errors contained in the *scire facias* in the above-entitled case, the judgment aforesaid ought not to be revoked, annulled, or held for nothing; because he says that at the time of the trial of the said McDonald, plaintiff in error, to wit, at the August sitting of the superior court held at Boston in the county of Suffolk for the transaction of criminal business, in the year of our Lord one thousand eight hundred and ninety-eight, and at the time of giving the judgment aforesaid, the constitutional rights of the said McDonald were fully explained to him; and of this it, the said Commonwealth, puts itself upon the country.

And the attorney general in behalf of the Commonwealth further says that, by reason of any matter of fact for error assigned in the eighth assignment of errors as aforesaid, the judgment aforesaid ought not to be revoked, annulled, or held for nothing; because he denies that at the time of said trial, after the judge's charge upon the whole indictment, the jury returned a verdict of guilty upon the two counts; but that nothing was said in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count; that he then proceeded to instruct them upon that count; and that the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count, all in manner and form as the said Mc-

Donald has above alleged; and he says that the proceedings at said trial were in all respects regular and according to law, and of this it, the said Commonwealth, puts itself upon the country.

And the attorney general in behalf of the Commonwealth further says that as to all assignments of errors in law contained in said assignment of errors there is not any error in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court here may proceed to examine as well the record and proceedings aforesaid as the matter aforesaid assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

FRANKLIN T. HAMMOND,
Assistant Attorney General, for the Commonwealth.

Filed October 13, 1898.

31 *Facts Agreed — by the Parties.*

It is agreed that the following facts, if material and competent in this proceeding, may be taken as true; but the Commonwealth, by agreeing hereto, does not waive, but expressly reserves, its right to object that none of the facts hereby agreed — are material or competent in this proceeding, or such as to furnish ground, on a writ of error, for the reversal or correction of the judgment to which these proceedings relate:

1. At the trial of the plaintiff in error in the superior court on August 9, 1898, when the plaintiff in error was set at the bar for trial, and as the jury was about to be called and impanelled, the clerk made the following announcement to him:

"John A. Macdonald, you are now set at the bar to be tried, and these good men whom I shall call are to pass between the Commonwealth and you on your trial, and you have a right to challenge any two of their number without assigning a reason therefor. If you do so or object to any of them for cause, you must do it as they are called and before they are sworn."

The trial then proceeding, after each witness for the Government had given his evidence and before he had left the stand, the plaintiff in error was informed by the court of his right to ask the witness any questions he desired. After the Government had rested its case, the plaintiff in error was informed by the court that he might produce any evidence he desired in his own behalf, or that he might testify in his own behalf, but that his refusal to testify would not be taken as evidence against him. After the evidence was all in, the plaintiff in error was informed of his right to address the jury in his own defence.

2. After the judge had charged the jury, and it had retired, the jurors came into court to return a verdict, and the following question was put by the clerk: "What say you, Mr. Foreman, upon the first count of the indictment? Is the prisoner guilty or not guilty?" The foreman responded and said, "Guilty." The clerk then inquired in the same manner as to the second, third, and fourth

counts, and the foreman said "Guilty" upon each count. When the clerk was about to inquire as to the habitual-criminal charge, the judge interrupted and said to the jury that he had forgotten to charge them as to that part of the indictment, and thereupon proceeded to do so. The jury then retired again to deliberate, subsequently returned to court, and were inquired of by the clerk as to that part of the indictment containing the habitual-criminal charge, and the jury said that the plaintiff in error was guilty of that
32 part of the indictment. No objections to the above proceedings were made at the trial by the plaintiff in error, and no exceptions were taken.

COMMONWEALTH OF MASSACHUSETTS,
By F. T. HAMMOND, *Assistant Attorney General.*
JOHN A. McDONALD, *Plaintiff in Error,*
By FRANCIS P. MURPHY, *Attorney.*

Filed October 31, 1898.

[Endorsed:] No. —. John A. McDonald, pl'ff in error, *v.* The Commonwealth. Petition for writ of error, &c. Suffolk county.

33 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

[SEAL.] To our trusty and well-beloved Albert Mason, Esquire, chief justice of our superior court, Greeting:

Because in the record and proceedings and also in the rendition of judgment between us, The Commonwealth of Massachusetts and John A. McDonald, in an indictment that was prosecuted in our superior court, held at Boston, within and for the county of Suffolk, at the August sitting thereof, in the year of our Lord one thousand eight hundred and ninety-eight, manifest error hath happened, as it is said, to the great damage of the said John A. McDonald, as by his complaint we are informed, we, willing that the error, if any hath been, should be duly amended and full and speedy justice done therein to the said parties, do command you that, if the judgment be therein rendered, you distinctly and openly send us the record and process of the suit aforesaid, with all things touching them, under your seal, together with this writ, so that we may have them before our justices of our supreme judicial court, to be held at Boston, within and for the county of Suffolk, on the first Monday of October next, that, inspecting the record and process aforesaid, we may, for correcting that error therein, further cause to be done what of right and according to law shall be — to be done.

Witness Walbridge A. Field, Esquire, at Boston, this thirteenth day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. COOPER, *Ass't Clerk.*

[Endorsed:] No. 6316. Writ of error.

34 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To the sheriffs of our several counties or their deputies, Greeting:

Whereas in the record and proceedings and also in the rendition of judgment in a certain indictment which was prosecuted in the superior court, holden at Boston, within and for the county of Suffolk, at the August sitting thereof, in the year of our Lord one thousand eight hundred and ninety-eight, by The Commonwealth against John A. McDonald, manifest error, as it is said, hath happaned, to the great damage of the said John A. McDonald, as from the complaint of the said John A. McDonald we have been informed, which record and proceedings and judgment thereon are by our writ of error ordered to be removed into our supreme judicial court, to be holden at Boston, within and for the county of Suffolk, on the first Monday of October next; and whereas the said John A. McDonald, by his attorney, has assigned errors and filed the same, which now remain in the clerk's office of our supreme judicial court, a true copy of which is hereto annexed, said to have happened in the said proceedings and judgment:

We therefore command you, willing that justice should be done in the premises, that you make known unto the said Commonwealth that it appear (if it sees cause) before our supreme judicial court, to be holden as aforesaid, to hear the errors aforesaid and to show cause (if any it has) why the said errors (if any) should not be corrected as to justice appertains.

Hereof fail not, and have you there this writ with your doings therein.

Witness Walbridge A. Field, Esquire, at Boston, this thirtieth day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

C. H. COOPER, *Ass't Clerk.*

[Endorsed:] No. 6316. *Scire facias ad aud. err.*

35 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May, 1899.

In the case of John A. McDonald, pl'ff in error, *vs.* Commonwealth, pending in the supreme judicial court for the county of Suffolk—

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment affirmed.

By the court:

HENRY A. CLAPP, *Clerk.*

May 18, 1899.

[Endorsed:] 6316. No. 1291. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. John A. McDonald, pl'ff in error, *vs.* Commonwealth.

36 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Supreme Judicial Court.

JOHN A. MCDONALD
v.
COMMONWEALTH OF MASSACHUSETTS.

Motion.

And now comes the defendant and moves that the judgment in the above-entitled case may be affirmed in accordance with the rescript sent down May 18, A. D. 1899.

By F. T. HAMMOND,
Assistant Attorney General.

Filed June 6, 1899.

37 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court.

JOHN A. MCDONALD, Plaintiff in Error,
v.
THE COMMONWEALTH OF MASSACHUSETTS.

It is therefore considered by the court, after rescript received from the supreme judicial court for the Commonwealth and in accordance therewith, on this ninth day of October, A. D. 1899, that the judgment aforesaid be, and the same is hereby, affirmed.

[Endorsed:] 6313. McDonald, — in error, *v.* Commonwealth. Judgment. Copy.

38 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Supreme Judicial Court.

I, John Noble, clerk of said court, hereby certify that the foregoing are true copies of:

1. The petition for writ of error, including the assignment of errors, p. 1.
2. The writ of error, p. 11.
3. The writ of *scire facias ad aud. err*, p. 12.
4. The return of the writ of error, p. 4, together with the record from the superior court, p. 4.
5. The plea of the Com'th, p. 8.
6. The facts agreed by parties, p. 9.
7. The rescript of the sup. jud. ct. for the Commonwealth, p. 13.
8. The motion for judgment, p. 14.
9. The judgment of affirmation after rescript, p. 15, in the case—

JOHN A. MCDONALD, Plaintiff in Error,
v.
THE COMMONWEALTH, Defendant in Error,

determined in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this tenth day of October, A. D. 1899.

[SEAL.] JOHN NOBLE, *Clerk.*

[10-cent U. S. internal-revenue stamp, canceled Oct. 10, 1899. J. N.]

[Endorsed:] No. 6316. McDonald, — in error, *v.* Commonwealth. Certificate.

40 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *May* 19, 1899.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of John A. McDonald *vs.* Commonwealth, decided on the 18th day of May, 1899.

GEO. F. TUCKER,
Reporter of Decisions.

40½ MORTON, *J.:*

This is a writ of error.

The first assignment of error is based on a misapprehension of St. 1887, c. 435, and of the offence with which the plaintiff was charged and for which he was sentenced. The charge in the indictment was for forging and uttering certain checks in this State. The plaintiff in error was found guilty and sentenced for that, not for the crimes of which he had been previously convicted in New Hampshire and in this State. St. 1887, c. 435, does not authorize a trial here for offences committed in another State or the imposition of a penalty for crimes committed elsewhere. It imposes a heavier penalty in the case of a previous offender, and provides that the fact that he has offended before may be shown by convictions in this or another State, or both. There is nothing unconstitutional in these provisions. In fixing a penalty regard may be had to previous conduct without limiting it to the jurisdiction in which
41 the last offence was committed. Commonwealth *v.* Graves, 155 Mass., 163. The statute is not in violation of the fourteenth amendment to the Constitution of the United States (Sturtevant *v.* Commonwealth, 158 Mass., 598). It does not operate to deprive a person sentenced under it of the equal protection of the laws. It bears alike upon all persons within the Commonwealth and similarly situated who have committed felonies in this State since it took effect or who may commit felonies hereafter. Tindley *v.* Anderson, 171 U. S., 101, 106. Whether the punishment is cruel and unusual, and may therefore come within the prohibition which forbids a State from abridging "the privileges and immunities of citizens of the United States," or from depriving "any person of life, liberty, or property without due process of the law," will be considered later.

The second assignment is disposed of by what has already been said.

The third assignment rests on the contention that the allegations in regard to the previous convictions charge the crime of being an habitual criminal and constitute a count which is improperly joined to those which precede it. It was necessary to allege and prove the previous convictions. Tuttle *v.* Commonwealth, 2 Gray, 505; Commonwealth *v.* Cody, 165 Mass., 598. If proved as alleged, they aggravated the offence with which the plaintiff was charged,
42 and if he was convicted of that, required that he should be sentenced as provided by the statute. They did not constitute of themselves a crime, and the words of presentment, as if another count was begun with which the allegations preceded properly, could be rejected as surplusage. Sturtevant *v.* Commonwealth, *ubi supra;* Commonwealth *v.* Walker, 163 Mass., 226; Commonwealth *v.* Cody, *ubi supra.*

In regard to the fourth assignment, it is to be said that there is no constitutional provision in this State guaranteeing counsel to a prisoner and no statutory provision in respect to counsel except in the case of an indictment for murder. Pub. Sts., c. 150, § 19; Conant *v.* Burnham, 133 Mass., 503, 506. Article VI of the amendments to the Constitution of the United States does not apply to the States or to proceedings in S[illegible] courts. Commonwealth *v.* Whiting, 108 Mass., 5. The agreed fac[illegible]how that the rights of the plaintiff in error were carefully guarded and stated and explained to him at the trial.

The fifth assignment is to the effect that the punishment provided by the statute is a cruel and unusual punishment, and is contrary to article V of the amendments to the Constitution of the United States, and to article XXVI of our declaration of rights. It is probable that article VIII instead of article V of the amendments to the Constitution of the United States is intended, as the latter contains no reference to cruel and unusual punishments; but neither article V nor article VIII applies to the States. *In re* Kemm-
43 ler, 136 U. S., 436, 446; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Whitney, *ubi supra.*

A similar provision in regard to cruel and unusual punishments is found, however, in article XXVI of the declaration of rights, except that the language there is that "no magistrate or court shall * * * inflict cruel or unusual punishments." As was said in Sturtevant *v.* Commonwealth, *ubi supra*, "This is directed to courts and not to the legislature." It is for the legislature to determine what acts shall be regarded as criminal and how they shall be punished. It would be going too far to say that their power is unlimited in these respects. Ordinarily the terms "cruel and unusual" imply something inhuman and barbarous in the nature of the punishment. *In re* Kemmler, *ubi supra.* But it is possible that imprisonment in the State prison for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment. However that may be, it cannot be held, we think, that the punishment is "cruel and unusual" when the statute pro-

vides, as it does here, that one who has been convicted in this State of a felony committed here since it went into effect, and who twice before in this State or another State, or both, has been sentenced and committed to prison for terms of not less than three years each, shall be punished by imprisonment in the State prison for twenty-five years. The penalty was determined, no doubt, by the
44 view that in such a case the criminal habit has become so fixed and the hope of reformation is so slight that the safety of society requires and justifies a long-continued imprisonment of the offender. The statute provides, however, that if it appears to the governor and council at any time that the convict has reformed they may release him conditionally for the residue of the term. We think that the statute is not open to the objection of imposing a cruel and unusual punishment.

The sixth assignment is disposed of by what has been said in regard to the first assignment.

The seventh assignment rests on the contention that the statute is *ex post facto* in its character, and is disposed of not only by what has been said under the first assignment, but also by Sturtevant *v.* Commonwealth, *ubi supra*, where the same objection was taken and overruled.

The eighth assignment is, 1st, that under the statute in question the plaintiff in error has been tried here for an offence committed in New Hampshire and for which he was punished there; and, 2dly, that the proceedings at the trial by which the jury, after returning a verdict upon the counts in regard to forging and uttering, were sent out again to deliberate upon the habitual-criminal charge and afterwards returned a verdict upon that, were irregular, prejudicial, and unconstitutional. What has been previously said in regard to the nature of the offence with which the plaintiff in
45 error was charged disposes of the first ground taken in this assignment. As to the second ground, it appears that the judge charged the jury and they retired, and afterwards came into court to render their verdict. They were asked by the clerk as to the first, second, third, and fourth counts successively whether the prisoner was guilty or not guilty, and returned a verdict of guilty on each count. Thereupon the clerk was about to inquire of them in regard to the habitual-criminal charge when the judge rose and said that he had forgotten to charge upon that and proceeded to do so, and they retired again, and afterwards came into court and rendered a verdict of guilty on that part of the indictment. We see nothing prejudicial or unconstitutional in this. Pritchard *v.* Hennessy, 1 Gray, 295; Florence Sewing Machine Co. *v.* Baker Sewing Machine Co., 110 Mass., 70, 82.

It was within the power of the court to correct the error or omission in the way in which it did, and to send the jury out again, after it had rendered its verdict on the counts for forging and uttering, to deliberate on the habitual-criminal charge. Mason *v.* Mason, 122 Mass., 477; Brown *v.* Dean, 123 Mass., 254.

Under the ninth assignment, if it may be called such, no errors are alleged, and there is nothing for us to consider.

The result is that none of the errors assigned being supported, the entry must be—

Judgment affirmed.

[Endorsed :] McDonald *vs.* Commonwealth. Certified copy of the opinion of the supreme judicial court.

Endorsed on cover: File No., 17,548. Massachusetts superior court. Term No., 149. John A. McDonald, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed October 24, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 149.

JOHN A. MACDONALD, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the superior court of Suffolk county, Massachusetts. The plaintiff in error was indicted in August, 1898, for forging and uttering as true certain bank checks, the indictment also charging the plaintiff in error with having been previously twice convicted and sentenced to prison for not less than three years, once in Massachusetts and once in New Hampshire. The plaintiff was tried, found guilty, and sentenced to the State prison for twenty-five years, as an habitual criminal, under Statutes 1887, chapter 435, section 1.

ASSIGNMENT OF ERRORS.

As errors of law, the plaintiff in error contends that:

1. Statute of 1887, chapter 435, violates certain provisions of the Constitutions of the United States and of this Commonwealth, and is therefore void.

2. The court had no jurisdiction because the indictment charged the commission of a crime outside of this Commonwealth, to wit, in New Hampshire.

3. The trial was irregular because of misjoinder of counts.

4. That the plaintiff in error was not represented at his trial by counsel, that his constitutional rights were not explained to him by the court, that he received no assistance from the Government in procuring counsel, and that by reason of his poverty he was unable to retain counsel.

5. That after the judge's charge on the whole indictment the jury returned a verdict of guilty; that when the jury were asked what they had to say on the habitual-criminal ~~charge~~ count the judge, stating that he had forgotten to charge them as to this matter, then instructed them upon that ~~charge~~ count, and that the jury, after again retiring, returned the second time, rendering a verdict of guilty on the habitual-criminal ~~charge~~ count.

The Commonwealth pleaded *in nullo est erratum* to the assignments of errors in law, and traversed certain of the assignments of errors in fact. The case comes to this court on

the petition, the assignments of errors, the record of the superior court, the Commonwealth's plea, and the agreed statement of facts and decisions of the supreme judicial court.

EXTRACTS FROM THE CONSTITUTIONS OF THE UNITED STATES AND OF THIS COMMONWEALTH AND THE STATUTES OF MASSACHUSETTS.

From the Constitution of the United States.

"ARTICLE I, SECTION 9. * * * No bill of attainder or *ex post facto* law shall be passed." * * *

"ARTICLE III, SECTION 2. * * * The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

"ARTICLE IV, SECTION 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." * * *

Amendment to the Constitution.

"ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment to the Constitution.

"ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendments to the Constitution.

"ARTICLE XIV, SECTION 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From the Constitution of Massachusetts.

Declaration of Rights.

"ARTICLE XII. No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled,

or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

"ARTICLE XXIV. Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

"ARTICLE XXVI. No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

From St. 1887, *c.* 435.

"SECTION 1. Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years: *Provided, however,* That if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act.

"SECTION 2. When it shall appear to the governor and council that any person sentenced to the State prison as an habitual criminal has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such conditions as they deem best; and they may revoke said permit at any time previous to its expiration. The violation by the holder of a permit, granted as aforesaid, of any of the terms or conditions of such permit, or the violation of any of the laws of this Commonwealth, shall of itself make void said permit.

"SECTION 3. When any permit granted under the provisions of the preceding section has been revoked, or has become void as aforesaid, the governor shall issue his warrant authorizing the arrest of the holder of said permit and his return to said State prison. Said warrant may be served by any officer authorized to serve criminal process in any county in this Commonwealth. The holder of said permit, when returned to said State prison as aforesaid, shall be detained therein according to the terms of his original sentence; and in computing the period of his confinement the time between his release upon said permit and his return to the State prison shall not be taken to be any part of the term of the sentence."

ARGUMENT.

First Assignment of Error.

The court erred in such judgment against the defendant because the indictment charges the defendant with the commission of a crime punishable by the laws of another State and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its amendments—that is, article 14 of its amendment. The court invaded the prisoner's constitutional rights when it assumed an extra-territorial jurisdiction and sentenced him to twenty-five (25) years as an habitual criminal for a crime committed in New Hampshire.

That the law under which the defendant was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 3, section 2, United States

Constitution, which holds that all trials for crimes except in cases of impeachment shall be held in the States where crimes are committed, and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional.

The conviction in the State of New Hampshire was entirely foreign to our State and could not as a matter of law be made an integral part of an offense committed in this State. The court embraced within its jurisdiction the jurisdiction of another State, and its action was extraterritorial, extrajudicial, and wholly void. If the court can take jurisdiction and sentence a man for a crime committed and expiated outside its borders and in another State, then the court could sentence a man under Public Statutes 1887, chapter 435, for a crime committed and expiated in States of Mexico or States of South and Central America, or any other foreign State or power, just as legally as a court can for a crime committed in another State. For instance, a man may be sentenced to State's prison in another State for a crime which is not a crime in Massachusetts, and *vice versa*. Under the different codes and constitutions of the various States the anomaly is presented of a crime made an integral part of an habitual-criminal count for which, if it was committed in another State, there could be no penalty.

That the law under which the defendant was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of article 3, section 2, United States Constitution, which holds that all trials for crimes, except in cases of impeachment, shall be held in the States where the crimes are committed, and the court erred in assuming jurisdiction of a

crime committed in another State, and such action was unconstitutional.

Art. 3, sec. 2, U. S. Const.
Art. 6, Amend. U. S. Const.
Art. 14, Amend. U. S. Const.

If a man under sentence of life imprisonment for murder was pardoned in Massachusetts on the ground that he should leave the country, it needs no argument to prove that if he went to Rhode Island, the Massachusetts laws could not reach him, and that the United States Constitution would not hold the above to be a violation of his parole. A State's jurisdiction ends at its borders. A court in Massachusetts could not punish one for a contempt of its decrees in a foreign State.

U. S. Const. Amendment, art. 14, sec. 1.

All persons born or naturalized in and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 14, sec. 1, U. S. Const.

The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed.

Art. 6, Amend. U. S. Const.

In all criminal prosecutions the accused shall have a right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Cooley, Const. Lim., chap. 10, 11.

Second Assignment of Error.

That any statute allowing the Government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its amendments, which guarantee a fair and impartial trial to persons charged with crimes.

In criminal proceedings the accused is permitted to offer evidence of good character.

Commonwealth *vs.* Webster, 5 Cush., 295, 324, 325.
McDaniel *vs.* State, 8 Sm. & M., 401.
People *vs.* Maett, 23 Hun., 60.
Harrington *vs.* State, 19 Ohio St., 264.
Carter *vs.* Com., 2 Va. Cases, 169.
State *vs.* Merrill, 2 Dev., 269.
Armor *vs.* State, 63 Ala., 173.
Laura Fair's case, 43 Cal., 137.
State *vs.* Daley, 53 Vt., 422–466.

Such evidence of good character being offered by the accused, the prosecution is permitted to introduce similar evidence of bad character in rebuttal.

The prosecution cannot, however, make bad character part of its original case; the initiative must be taken by the accused.

1 Wharton's Crim. Law, secs. 636–646.
3 Davies' Ab., c. 84, art. 1, sec. 5.
Oliver *vs.* State, 11 Brown (Neb.), 427.
State *vs.* Cresen, 38 Mo., 372.

C. J. Shaw, in Com. *vs.* Webster, 5 Cushing, 324, says:

"It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the Government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character."

If it can be said that the prior convictions and commitments only proved particular facts and not the general bad character of the accused, the case of Com. *vs.* O'Brien, 119 Mass., 342, says:

"Where a person accused of a criminal offense, introduced evidence tending to show that his general reputation is good, it is not competent for the government in reply, to put in evidence of particular facts."—Judge Endicott.

A defendant can testify if he sees fit. If he does not choose

to avail himself of that privilege unfavorable inferences are not to be drawn to his prejudice from that circumstance.

People *vs.* Tyler, 36 Cal., 522.

State *vs.* Cameron, 40 Vt., 555.

Carne *vs.* Litchfield, 2 Mich., 340.

Article 5, amendment to United States Constitution, declares that no man shall be compelled in any criminal case to be a witness against himself, nor, as above stated, can any unfavorable inference be drawn against him for failure to so testify, but this method of procedure destroys the presumption of innocence, which constitutional shield the law throws over every man, and prejudices his case in an unheard-of manner and really deprives him of every right which he ought to possess under the United States Constitution and amendments and Massachusetts constitution and bill of rights.

Cooley's Const. Lim., 387, 388.

This method of trying a case by introducing evidence of previous bad character of the defendant, and then putting in evidence of the particular crime for which he is indicted, can hardly be said to be a fair and impartial trial, and one such as is guaranteed by the Constitution.

Bill of Rights, art. 1, 12.

By introducing records of prior convictions and commitments in the habitual-criminal count, a man is practically compelled to furnish evidence against himself, and thereby violating article 12, Bill of Rights, and United States Constitution, article 5, amendments.

Leonard v. Leonard, 151 Mass. Reports p. 151.

Third Assignment of Error.

The crime of being an habitual criminal was unknown to the common law, and also to the statute law prior to 1887. It is the creation of a statute, and when the statute was passed allowing joinder of offenses not permissible at common law there was no such crime known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual-criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular.

Public Statutes, chapter 213, section 18, says:

"Two or more counts describing different offenses depending upon the same transactions may be set forth in the same complaint or indictment, if the complaint or indictment contains an averment that they are different descriptions of the same act."

Now, this Public Statute, 213, section 18, was passed many years before the habitual-criminal act was enacted, and up to the present day there is no statutory authority for the joinder of an habitual-criminal count to a count for any other felony. Being unlawfully joined, the trial was irregular and consequently void, and the whole proceeding invalid.

This order of proof in an habitual-criminal case has no statutory or common-law authority whatever, and is directly opposed to all the prisoner's rights under the Constitution of the United States, guaranteeing him a fair and impartial trial.

No part of the record of an indictment or any count thereof presented and signed by a foreman of a grand jury and returned under oath to the court upon which a trial is had by a jury and a verdict of guilty rendered on that count and sentence imposed thereon can be rejected as surplusage.

This point was not considered or raised in the cases the supreme judicial court of Massachusetts cites in rendering this opinion.

In Com. *vs.* Cody, cited in 165 Mass., 138, the habitual-criminal count was abandoned by the Government, and no verdict was taken thereon.

To say that the doings of a grand jury signed and returned under oath to the court are a nullity or surplusage and could be rejected as surplusage, and that a sentence of twenty-five years can be imposed in such a so-called nullity or surplusage, strikes at the very foundations of criminal procedure and infringes upon the rights guaranteed by the United States Constitution and amendments to the humblest citizen of this country.

The supreme judicial court of Massachusetts practically contradicts this in the eighth assignment, wherein it considers error or omission by sending jury out for the second time to consider the habitual-criminal count separately and alone after they had finished on the forgery counts. If this count was a nullity, why were jury sent out to bring a verdict in upon it? The words habitual-criminal "charge" are absolutely unheard of in criminal procedure. An indictment consists of counts. No one ever heard of an integral part of an indictment being called a "charge" and of a verdict bein rendered upon a "charge" and not upon a count.

It has been considered heretofore a count in Massachusetts and so worded in opinions (165 Mass., p. 138), distinctly calls it count, and in every indictment for being a habitual criminal under the act in Massachusetts since law was passed it has been presented and returned by a grand jury as a count in the usual manner and form of every felony.

Commonwealth *vs.* Walker, 163 Mass., 226.

Fourth Assignment of Error.

It appears by absence of any record of an appearance of counsel that the prisoner at his trial was not represented by counsel, nor were his constitutional rights explained to him by the court, and in consequence thereof said trial was unconstitutional and contrary to article 12, constitution of Massachusetts, and article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial, and that he received no assistance from the Government in procuring counsel, and by reason of his poverty he was unable to retain counsel, and that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, article 6, guaranteeing the accused counsel in all criminal prosecutions, and that it is also contrary to article 12, constitution of Massachusetts.

The prisoner contends that in such a crime as he was indicted for he had a right to have counsel assigned him by the court. The punishment was an infamous one, and defendant contends that the words as used in article 6, amendment to United States Constitution, are mandatory and leave

nothing to the discretion of the court. He also insists that the Government, by introducing the record of a foreign conviction, violated that part of the constitutions which say that no man shall be compelled to furnish evidence against himself, and destroyed the presumption of innocence.

Art. 5, Amend. U. S. Const.

This right is recognized in New York and numerous States, particularly in the West, where a defendant, in cases not capital, has counsel assigned him by the court when he is charged with an infamous crime and is unable by reason of his poverty to hire counsel.

Any action of the court during the progress of a trial for felony which deprives the defendant of a substantial legal right in the premises or, to any extent to his prejudice, withholds or abridges any constitutional right of the defendant and by him claimed on trial is a proper matter for review on appeal.

People *vs.* Keenan, 13 Cal., 384.

Defendant contends that this case is analogous to the above, and that his rights were not sufficiently protected.

Fifth Assignment of Error.

That the law under which the defendant was sentenced is unconstitutional under United States Constitution, article 8 of amendments thereof, and article 26, constitution of Massachusetts, in that the punishment inflicted is a cruel and unusual punishment.

Defendant contends that this sentence in itself is a cruel

and unusual punishment, in that it inflicts practically a life sentence upon every one sentenced under it. This sentence was unheard of at the early common or statutory law, and inflicts punishment for crimes for which the defendant has already expiated. It is foreign to Federal and State constitutions and is vindictive in its spirit, and the discretion which the act commits to the court is a hardship unknown to any system of criminal jurisprudence, and is in violation of article 8, amendments to United States Constitution.

Sixth Assignment of Error.

That the said sentence was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 4, section 2, United States Constitution, which gives to every citizen the equal protection of the laws, and therefore the State by assuming the jurisdiction of a foreign crime once expiated in New Hampshire did not give the defendant equal protection of the laws or the protection a citizen of the United States under the United States Constitution and amendments is entitled to in felonious cases.

A defendant has served time in New York and New Jersey of terms of three or more years each. Now, if this man is afterwards tried in Massachusetts for a felony, the habitual-criminal act is powerless to punish him; whereas, if he served time in one State and also in Massachusetts, the Government claims that the act would apply. There is no equal protection of the laws in such a case, and the defendant's constitutional rights are infringed upon. In fact, under this a man may serve time in many States of the Union and commit a felony here, and then escape the habitual-crimi-

nal penalty because he has not previously served a term in this State. Serving a term of imprisonment here is a condition precedent to the act taking effect, and is in violation of the equal protection of the laws to a citizen of the United States, which the United States Constitution gives him (article 4, section 2).

Seventh Assignment of Error.

That the law under which the prisoner was sentenced, Public Statutes 1887, chapter 435, was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 1, section 9, of the United States Constitution, which declare that no *ex post facto* laws shall be enacted.

The Constitution says that no man shall be compelled to furnish evidence against himself. If a man's past record is considered and made a count of a felony, it destroys the presumption of innocence, which constitutional shield the law gives the accused in all trials of felony.

Cooley, Const. Lim., 318–328.

Kring *vs.* Missouri, 107 U. S., 221, 228, 229, 230.

It is plain from the discussion and also on fundamental principles that in order to render legislation unconstitutional as *ex post facto* it is not necessary to show that it must be detrimental to all persons charged with offenses. It is sufficient that it materially alters their conditions in a manner which may be substantially detrimental to some.

The defendant was entitled to a judicial termination of his sentences in New Hampshire and Massachusetts. This law is unconstitutional and retroactive, because it deprived

the prisoner charged with crime to a judicial determination of his sentence given by the law existing when the offense was committed.

The defendant was entitled to a sentence on the crime of which he was convicted. There is nothing in the record to prevent the court from sentencing him on that crime—*i. e.*, of forgery and uttering—after his term of twenty-five years for being an habitual criminal has expired. This procedure is clearly contrary to the Constitution and a man's rights therein.

Section 2, Acts of 1887, chapter 435, simply reiterates the pardoning power already vested in the governor and council from time immemorial, and does not give the prisoner additional rights.

See Cooley, Constitutional Limitations, page 319:

"I will state what laws I consider *ex post facto* laws within the intent of the prohibition.

"1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

"2. Every law that aggravates a crime, and makes it greater than it was when committed.

"3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

"4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive."

Defendant contends that the habitual-criminal law (Acts of 1887, 435) is *ex post facto* and in violation of article 1,

section 9, United States Constitution, and article 24, Massachusetts constitution, bill of rights.

Eighth Assignment of Error.

That the law under which the prisoner was sentenced (Public Statutes 1887, chapter 435) was unconstitutional, inasmuch as its enactment was contrary to the provisions of article 5 of the United States Constitution and amendments thereto—no man shall be put in jeopardy twice for the same offense—which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that after the judge's charge upon the whole indictment the jury returned a verdict of guilty upon the four counts, as appears by the record, but said nothing in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count; that this whole procedure was irregular, prejudicial, and unconstitutional, and that the prisoner was unable, by lack of counsel, to take exceptions to these facts.

The petitioner was put in jeopardy twice for the same offense when the court took jurisdiction of the crime committed and expiated in New Hampshire, and sentenced him to twenty-five years as an habitual criminal.

We contend that the United States constitutional rights of

the defendant tried in the State court were infringed upon or abridged to his detriment.

We claim that petitioner was put twice in jeopardy, contrary to the United States Constitution and amendments.

Cooley, Const. Lim., 398–401.

One trial and verdict must, as a general rule, protect him against any subsequent accusation of the same offense, whether the verdict be for or against him, and the verdict constitutes a bar to a new prosecution.

Cooley, 398, 399.

It is plain that the using of the New Hampshire verdict in a prosecution in this State was putting a man in jeopardy twice for the same offense, since the defendant was again sentenced in Massachusetts on a count for that crime committed and expiated in the foreign State of New Hampshire.

Ninth Assignment of Error.

The prisoner waives no rights which may not be stated in detail here and which may be apparent on the record, either under the Constitution of the United States and amendments thereof or under the Massachusetts constitution and bill of rights.

Prisoner contends that the law under which he was sentenced, viz., Public Statutes 1887, chapter 535, is in violation of the letter and spirit of the Constitution of the United States and the amendments thereof, and constitution of Massachusetts and bill of rights, and that said law is therefore unconstitutional.

Argument on Facts Agreed to by Parties.

Public Statutes, chapter 170, section 42, applies to criminal as well as civil cases. It applies to cases where the jury have not agreed upon a verdict and have not finished their deliberations. In the case at bar the jury had finished their deliberations, and, the judge having forgotten to charge them upon the habitual-criminal count, they had reported a verdict on all they were instructed upon. The habitual-criminal count not having been placed before them for their consideration when the judge sent them out for the first time, he had no authority to send them out for a second time because they had finished their deliberations, and the presiding justice had no authority to send them out again because they did not ask for any instructions as to the law.

There is a distinction between cases of felony and misdemeanors, and again between civil cases and criminal cases. We contend that in this case, in which conviction carried an infamous punishment, all the rigor of a capital case should have been carried out regarding the rules for a jury.

Defendant also claims that the action of the court in sending the jury out for a second time, after they were charged and had finished their deliberations, is in violation of the Constitution of the United States and amendments.

The agreed facts will show that the defendant was informed that he could only challenge two of the jurors without cause (whether any challenges are allowed on an habitual-criminal count defendant has not been able to determine from any legal authority, but, being a count for a crime, defendant must be entitled to at least two pre-emptory

challenges. The statutes have not provided for challeng
in such a case, and by not so doing had infringed upon th
defendant's constitutional rights guaranteeing a fair an
impartial trial), and said trial was in violation of the Co
stitution of the United States and amendments.

Respectfully submitted.

FRANCIS P. MURPHY,
Attorney for Plaintiff in Error.

17543

Supreme Court of the United States.

No. 149. October Term, 1900.

JOHN A. McDONALD, Plaintiff in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH.

Statement of the Case.

The plaintiff in error was indicted under Pub. Sts. of Mass., c. 204, §§ 1 and 2, and on Aug. 9, 1898, was found guilty in the Superior Court on four counts, two of which charged him with forging orders of money, and two with uttering the same, knowing them to be forged.

The indictment also alleged, and the jury found, that in April, 1890, he was convicted of perjury in Massachusetts, sentenced therefor and committed in pursuance thereof to the State Prison for three years; also that in January, 1894, he was convicted of obtaining money by false pretences in New Hampshire, sentenced therefor and committed in pursuance thereof to the State Prison of that State for four years. Upon this finding of the jury he was, in accordance with Mass. St. 1887, c. 435, adjudged to be an habitual criminal, and sentenced and committed to the State Prison for the term of twenty-five years.

The statute is as follows: —

"AN ACT TO PROVIDE FOR THE PUNISHMENT OF HABITUAL CRIMINALS.

"SECTION 1. Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for twenty-five years: *provided, however*, that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act.

"SECTION 2. When it shall appear to the governor and council that any person sentenced to the state prison as an habitual criminal has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such conditions as they deem best; and they may revoke said permit at any time previous to its expiration. The violation by the holder of a permit, granted as aforesaid, of any of the terms or conditions of such permit, or the violation of any of the laws of this Commonwealth, shall of itself make void said permit.

"SECTION 3. When any permit granted under the provisions of the preceding section has been revoked, or has become void as aforesaid, the governor shall issue his warrant authorizing the arrest of the holder of said permit and his return to said state prison. Said warrant may be served by any officer authorized to serve criminal process in any county in this Commonwealth. The holder of said permit, when returned to said state prison as aforesaid, shall be detained therein according to the terms of his original sentence; and in computing the period of his confinement the time between his release upon said permit and his return to the state prison shall not be taken to be any part of the term of the sentence."

The plaintiff in error at the trial did not object to any of the proceedings nor take any exceptions. But soon after his conviction he sued a writ of error out of the Supreme Judicial Court of Massachusetts, to reverse the judgment of the Superior Court, on account of certain alleged errors of law and of fact in the proceedings of that court.

On May 18, 1899, the Supreme Judicial Court affirmed the judgment of the Superior Court, and the case comes to this court on error.

First Assignment.

"The court erred in such judgment against the petitioner because the indictment charges the defendant with the commission of a crime punishable by the laws of another State and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its Amendments, — that is, Article 14 of its Amendments. The court invaded the prisoner's constitutional rights when it assumed as extra-territorial jursidiction and sentenced him to twenty-five years as an habitual criminal for a crime committed in New Hampshire. That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of Article 3, section 2, United States Constitution, holds that all crimes except in cases of impeachment shall be held in the States where crimes are committed; and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional."

Second Assignment.

"That any statute allowing the government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its Amendments, which guarantee a fair and impartial trial to persons charged with crimes."

Third Assignment.

"The crime of being an habitual criminal was unknown to the common law and also to the statute law prior to 1887. It is a creation of statute, and when the statute was passed allowing joinder of offences not permissible at common law there was no such crime known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual-criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular."

These assignments are based upon an entire misconception by the plaintiff in error of the terms, spirit and purport of the statute. It does not in terms nor by intendment make it a criminal offence in Massachusetts to have committed a crime in New Hampshire, nor to have committed a crime in Massachusetts (upon which he has already been tried, convicted and sentenced) prior to the commission of another crime. Nor does it authorize an indictment against a man for such prior crimes, convictions and sentences.

The plaintiff in error seems to suppose that he was indicted for and convicted of three crimes. Such was not the case. The statute was enacted for the purpose of authorizing the court to increase the sentence of a convict who is shown to have been twice previously convicted. The question of sentence is always one peculiarly dependent upon previous character. Every civilized community has from time immemorial wisely provided gradations of punishment, dependent upon the behavior of a man previous to the commission of the crime for which he stands convict.

The term "habitual criminal" is not employed to describe a crime, but a condition. It is descriptive of the character of a prisoner to be sentenced, and nothing more. In other words, the statute directs that the court shall, upon information that a convict has been twice previously sentenced, impose a longer sentence for the crime for which he stands convict, in consequence of that fact.

The fact of prior convictions must be found by the jury, and the court may not enter judgment without such finding by them.

If it were true that the plaintiff in error had been convicted and was now imprisoned in Massachusetts for an offence committed in New Hampshire, the defendant in error would at once concede that the proceedings in its Superior Court ought to be quashed, for it admits that it has no jurisdiction over offences committed outside of its territorial limits. The fact is, however, that he was not tried for the offence of obtaining money by false pretences in New Hampshire in 1894, nor for the offence of perjury committed in Massachusetts in 1890, but only for the offences of forging and uttering checks in Massachusetts in July, 1898.

The statute of 1887, c. 435, does not authorize trial, conviction or sentence for offences committed outside the limits of the State of Massachusetts, but provides merely for the punishment of certain persons "upon conviction of a felony committed in this State after the passage of this act." Persons convicted of felony who have been twice convicted and imprisoned before for crimes punishable by imprisonment for three years are deemed to be habitual criminals, and punished by imprisonment in the State Prison for a term of twenty-five years. There is nothing in the act itself or in the title thereof to suggest that it authorizes a trial for offences committed beyond the jurisdiction of the State. It is simply an act in furtherance of a scheme for punishing old offenders, which has been in force in Massachusetts since 1804.

Commonwealth v. *Richardson*, 175 Mass. 202, 205.

The plaintiff in error was not tried nor convicted for any offence except the offences of forging and uttering checks in Massachusetts. It is true that allegations in the indictment set forth that he had committed crimes in Massachusetts and in New Hampshire, and that he had been convicted and imprisoned therefor. But those allegations went, neither to charge him with another crime nor to prove him guilty of forging and uttering, but to solely aggravate his punishment in case he were found guilty of forging and uttering.

They were inserted in the indictment because both the common law and Article 12 of the Declaration of Rights of Massachusetts protect a person accused of crime, and prevent the State from confronting him at his trial with charges not fully and plainly, substantially and formally, described to him in the indictment. But, if the plaintiff in error had been acquitted on the counts for forging and uttering, he could not have been convicted as an habitual criminal.

In *Commonwealth* v. *Walker*, 163 Mass. 226, it was held that the allegations in the indictment of former conviction and sentence were necessary if evidence was to be introduced with a view of proving the defendant an habitual criminal, and that the words of presentment before such allegations did not denote the beginning of an habitual criminal count, but might be rejected as surplusage.

There is, therefore, no misjoinder of counts in the indictment, as the plaintiff alleges in his third assignment of errors. Nor can it be said that the insertion in the indictment of the allegations as to former convictions violated any provisions of the Fourteenth Amendment. Those allegations were made, not to abridge the privileges and immunities of the plaintiff in error as a citizen of the United States, but to protect them; not to deprive him of his liberty without due process of law, but to ensure to him all the benefits of a trial by due process of law. They were not made and do not go to prove him guilty of forging and uttering checks, any more than one count for forging a check went to prove him guilty on a count for uttering the same.

Since, therefore, the indictment is in the form authorized by the Statutes of Massachusetts, and does not violate any of the provisions of the Fourteenth Amendment, the decision of the Supreme Judicial Court of Massachusetts as to the sufficiency thereof is final. Merely technical objections to the form of an indictment do not raise any federal question for the consideration of this court. *Caldwell* v. *Texas*, 137 U. S. 692.

Fourth Assignment.

"It appears by the absence from the record of any appearance of counsel, and as a matter of fact is, that the prisoner at his trial was not represented by counsel, nor were his constitutional rights

explained to him by the court, and in consequence thereof said trial was unconstitutional. Article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial; that he received no assistance from the government in procuring counsel, and by reason of his poverty he was unable to retain counsel; that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, Article 6, guaranteeing the accused counsel in all criminal prosecutions."

The Sixth Amendment is not applicable to criminal prosecution of a citizen of the United States in the State courts.

Maxwell v. *Dow*, 176 U. S. 581.

Moreover, all that the Sixth Amendment guarantees to an accused under any possible construction is "the right . . . to have the assistance of counsel." It does not appear that the plaintiff in error made any request to have counsel assigned him, which was denied. If he had the right to demand the assistance of counsel, he would waive it, and apparently he did. It cannot be said that the Sixth Amendment imposed upon the Superior Court the duty of assigning him counsel, without notice from him that he desired the assistance of counsel.

Nor is there any provision in the Constitution of Massachusetts, or in the statutes thereof, requiring the court to assign counsel to accused persons. The only statute relating to the matter is one providing that upon an indictment for a capital crime the court may assign counsel.

Mass. Pub. Sts., c. 150, § 19.
Conant v. *Burnham*, 133 Mass. 503, 506.

Fifth Assignment.

"That the law and *sentence* under which the defendant was sentenced is unconstitutional, inasmuch as its enactment is contrary to a provision of Article 8 of Amendments, United States Constitu-

tion, in that the punishment inflicted was a cruel and unusual punishment."

Article 8 of the Amendments and the Constitution of the United States is not applicable to proceedings in State courts.

In re Kemmler, 136 U. S. 436, 446.

Moreover, the sentence was neither unusual nor cruel, as sentences go. The plaintiff in error might have been sentenced to imprisonment in the State Prison for a term of forty years, under Pub. Sts., c. 204, § § 1 and 2, if the charges as to the former convictions and imprisonment had been omitted from the indictment.

See *Moore* v. *Missouri*, 159 U. S. 673.

Nor can it be said to be unusual or cruel for the court to pronounce a man to be an habitual criminal, who clearly is one.

Sixth Assignment.

"That the said sentence is unconstitutional, inasmuch as its enactment is contrary to the provision of Article 4, section 2, United States Constitution, and the Eighth and Fourteenth Amendments thereof."

Under this assignment the plaintiff in error may contend that he has been deprived of his liberty without due process of law. But, even if such a contention is fairly open to argument, which the defendant in error does not admit, yet it is respectfully submitted that it cannot prevail. The agreed facts, if material, show that the rights of the plaintiff in error were carefully guarded and explained to him by the court at every stage of the proceedings during his trial. The fact that the presiding judge omitted to instruct the jury as to the habitual criminal charge until after they had returned their verdict on the counts for forging and uttering, and that he then instructed them and they retired and later returned that the plaintiff in error was guilty of that part of the indictment, did not work any denial of due process of law in his behalf. He could not have

prevailed upon a bill of exceptions, if he had taken an exception to that proceeding, which he did not.

Pritchard v. *Hennessey*, 1 Gray, 294.
Florence Sewing Machine Co. v. *Grover & Baker Sewing Machine Co.*, 110 Mass. 70, 82.
Nichols v. *Munsel*, 115 Mass. 567.
Commonwealth v. *Carrington*, 116 Mass. 37.
Mason v. *Massa*, 122 Mass. 477.
Brown v. *Dean*, 123 Mass. 254.
Kenney v. *Habich*, 137 Mass. 421.

All the proceedings at his trial, therefore, were in strict accordance with the established usage and practice of the State, were reasonable in their nature, and did not work any denial of the fundamental rights of the plaintiff in error as a citizen of the State or of the United States.

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Hurtado v. *California*, 110 U. S. 516, 537.
Hodgson v. *Vermont*, 168 U. S. 262, 272, 273.

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. . . . The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century, and make such changes as may be necessary."

Brown v. *New Jersey*, 175 U. S. 172, 175.

See also

In re Kemmler, 136 U. S. 436, 448, 449.
In re Converse, 137 U. S. 624.

It was suggested by counsel for the plaintiff in error in his argument before the Supreme Judicial Court of Massachusetts that the habitual criminal act of 1887 deprived the plaintiff in error of the equal protection of the laws, because it did not include within its terms those persons who had committed one crime in each of two other States of the United States and been imprisoned three years in each such State therefor. That is to say, if some other person who had been previously convicted once in New Hampshire and once in New York and committed for the term of three years in each State, had been convicted of felony in Massachusetts, he could not be punished as an habitual criminal under the statue.

The objection does not go to the reasonableness of the classification which includes the plaintiff in error, but to the reasonableness of another classification based upon two convictions had outside of Massachusetts but which does not include two convictions had in two States outside of Massachusetts.

The statute of 1887 subjects three classes of old offenders to increased punishment upon their third conviction, to wit: —

1. Persons who have been convicted twice in Massachusetts.

2. Persons who have been convicted once in Massachusetts and once in some other State.

3. Persons who have been convicted twice in one other State.

The plaintiff in error is of the second class, and he is entitled to receive and does receive from the State the same protection that all other persons of his class receive. Every person who has offended once against the laws of some other State and once against the laws of Massachusetts, and been committed for the required length of time on each conviction, is liable to punishment as an habitual criminal upon conviction of felony in Massachusetts. And the theory of that classification is reasonable.

The State might have provided that a person should be liable to the same aggravated punishment as was imposed upon the plaintiff in error, upon a second conviction in Massachusetts, without regard to whether he had been convicted at all in some other State.

Moore v. *Missouri*, 159 U. S. 673.

The fact that it did not make such a provision might have worked to the advantage of the plaintiff in error if he had never been convicted in New Hampshire, for then he could not have been subjected to punishment as an habitual criminal. That the State is more merciful, and does not aggravate punishment unless a person has been convicted once at least therein and once in some other State, cannot have the effect of rendering the statute unconstitutional, as to this plaintiff in error at least. If he were a person who had never offended against the laws of Massachusetts before, but had offended against the laws of New Hampshire twice, so as to bring him within the third class mentioned in the statute, he might have some ground for contending that he did not receive the same protection from the State of Massachusetts that some other person received who had been twice convicted and imprisoned before outside her jurisdiction. But no such objection is open to him now. He is an old offender against the laws of Massachusetts, and he is treated like all other old offenders of his class. The fact that the State attempts to subject another class of old offenders to the aggravated punishment, and possibly does not include all old offenders who fall within that class, does not raise any constitutional question of which he can take advantage in this proceeding. He might as well say that he should not be punished as an old offender, because another man, who had been convicted and imprisoned twice in Mexico, could not be so punished.

If the State may provide that a person shall be punished more severely upon a second conviction, it clearly has the right to provide that he shall be punished more severely upon a third conviction, even though one of the former convictions was had in some other State of the United States. The plaintiff in error cannot complain that he is denied the equal protection of the law because he had been convicted only once in Massachusetts, while persons who have never been convicted elsewhere must have been convicted twice in Massachusetts to be subjected to aggravated punishment on their third conviction under the statute. He had offended before against the laws of Massachusetts, and also against the laws of New Hampshire. To say that Massachusetts could not take into consid-

eration his offence in New Hampshire, and inflict the same punishment upon him that it would inflict upon another person who had offended against the laws of Massachusetts twice before, is to carry the equal protection provision of the Fourteenth Amendment to an absurd limit. Every system of punishments would be open to successful attack under it. Even the three-years provision of this statute would be objectionable. Why should a person who had been twice committed for terms of three years each be more severely punished on a third conviction than another who had been twice committed for terms of two years and three hundred and sixty-four days each? Why should women receive the same punishment as men for first offences? It might be contended that they usually have more excuse for committing their first offence than men have.

The fact is that every system of punishment must be more or less arbitrary. The State must divide criminals into classes in a more or less arbitrary manner. It is beyond the power of organized society to mete out absolute equality of punishment for the same degree of criminality in all cases. But it is well settled that the Fourteenth Amendment does not pretend to limit the States in their jurisdiction, so long as they classify criminality upon a reasonable theory, and do not deprive one offender of the same protection that other offenders of his class are entitled to receive.

Pace v. *Alabama*, 106 U. S. 583.

The fact that the statute attempts to include within its terms another class of persons who have been convicted twice outside of Massachusetts, and possibly does not include all who may fall within that class, does not render it unconstitutional as to those classes that it does include fully. If it is unconstitutional as to this the plaintiff in error, it is unconstitutional a to persons who have been convicted twice before in Massachusetts. There is no middle ground. But it is well settled that "where a statute has been passed by the Legislature, under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all

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other parts of the act, not obnoxious to the same objection, will be held valid and have the force of law."

Fisher v. *McGirr*, 1 Gray, 1, 21.
Warren v. *Charlestown*, 2 Gray, 84, 98.
Commonwealth v. *Clapp*, 5 Gray, 97, 100.
Commonwealth v. *Hutchins*, 5 Gray, 482, 485.

If, therefore, the statute is unconstitutional as to those persons who clearly fall within its third class, because it does not include in that class all persons who have been convicted twice before outside of Massachusetts, the attempt at a third classification can be treated as a nullity without in any way invalidating the remainder of the act.

Seventh Assignment.

"That the law under which the prisoner was sentenced — St. 1887, c. 435 — is unconstitutional, inasmuch as its enactment is contrary to the provision of Article 1, section 9, of the United States Constitution, which declares that no *ex post facto* laws shall be enacted."

The statute in question is not an *ex post facto* law; it applies only to punishment for offences committed "after the passage of this act." It could not, therefore, be applicable to any case where the offence was committed before its enactment. Moreover, if it were open to objection as an *ex post facto* law in any case, it is clear that it is not open to that objection in this case. Neither the offence for which the plaintiff in error was convicted, nor the former offences which went to aggravate his punishment, were committed before the enactment of the statute. A law is not *ex post facto* as to any particular offence, if enacted before the commission of that offence.

Kring v. *Missouri*, 107 U. S. 221, 225.

The Supreme Judicial Court of Massachusetts has decided that the statute is not *ex post facto*, although the two offences which went to aggravate the punishment of the accused were committed before its enactment, the offence for which he was convicted having been committed afterwards.

Sturtevant v. *Commonwealth*, 158 Mass. 598.

Eighth Assignment.

"That the law under which the prisoner was sentenced — St. 1887, c. 435 — is unconstitutional, inasmuch as its enactment is contrary to the provision of Article 5 of the United States Constitution, which declares that no man shall be put in jeopardy twice for the same offence, which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that after the judge's charge upon the whole indictment the jury returned a verdict of guilty upon the four counts, as appears by the record, but said nothing in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count; that this whole procedure was irregular, prejudicial and unconstitutional, and that the prisoner was unable by lack of counsel to take exceptions to these facts."

That the plaintiff in error was not twice put in jeopardy for the same offence is conclusively settled by *Moore* v. *Missouri*, 159 U. S. 673.

The remaining allegations (if any) are fully considered in the discussion of the first, second and third assignments of error, *supra*.

Ninth Assignment.

"The prisoner waives no rights which may not be stated in detail here, and which may be apparent on the record, under the Constitution of the United States and Amendments thereof."

This is not an assignment of error. The contrary rather.

HOSEA M. KNOWLTON,
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for Defendant in Error.

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Supreme Court of the United States.

No. 149.—October Term, 1900.

John A. McDonald, Plaintiff in Error, vs. The Commonwealth of Massachusetts. } In error to the Superior Court of the State of Massachusetts.

[February 25, 1901.]

Mr Justice Gray delivered the opinion of the Court.

The plaintiff in error was indicted at August term, 1898, of the Superior Court in the county of Suffolk and State of Massachusetts, on the statute of Massachusetts of 1887, chapter 435, section 1, by which "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years: provided, however, that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act."

Section 2 provides that when it appears to the Governor and Council that the convict has reformed, they may release him conditionally from the rest of his sentence.

The indictment contained four counts, two charging the defendant with forging an order for money, and two with uttering as true a forged order for money; and further alleged that in April, 1890, he had been convicted in Massachusetts of perjury, and therefor sentenced and committed to the State prison for three years; and also in January, 1894, had been convicted in New Hampshire of obtaining property by false pretences, and therefor sentenced and committed to the State prison for four years.

The defendant pleaded not guilty, and was tried by a jury, who returned a verdict that he was guilty of the whole indictment; and the court thereupon adjudged him to be an habitual criminal, and sentenced him to be punished by imprisonment in the State prison for the term of twenty-five years.

The defendant sued out a writ of error from the Supreme Judicial Court of Massachusetts, which affirmed the judgment. 173 Mass. 322. He then sued out this writ of error from this court to the Superior Court, in which the record remains.

The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another State, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the statute of 1827, c. 118, § 19, and by the Revised Statutes of 1836, c. 133, § 13. It is within the discretion of the legislature of the State to treat former imprisonment in another State, as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not *ex post facto*. It affects alike all persons similarly situated, and therefore does not deprive any one of the equal protection of the laws. *Moore* v. *Missouri*, 159 U. S. 673; *Ross's case*, 2 Pick. 165; *Commonwealth* v. *Graves*, 155 Mass. 163; *Sturtevant* v. *Commonwealth*, 158 Mass. 598; *Commonwealth* v. *Richardson*, 175 Mass. 202.

The statute does not impair the right of trial by jury, or put the accused twice in jeopardy for the same offence, or impose a cruel or unusual punishment. There is therefore no occasion to consider whether any of the provisions of the Constitution of the United States on these points can apply to the courts of the several States. *In re Kemmler*, 136 U. S. 436; *Brown* v. *New Jersey*, 175 U. S. 172; *Maxwell* v. *Dow*, 176 U. S. 581.

The suggestion of misjoinder of counts in the indictment, and the objection that instructions on the habitual criminal charge were first given by the court to the jury after they had said that the defendant was guilty of the specific offences charged, present no Federal question.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.